

Exhibit D

M Civ JI 6.01 Failure to Produce Evidence or a Witness

(a)*(The [plaintiff / defendant] in this case has not offered [the testimony of [name] / [identify exhibit]]. As this evidence was under the control of the [plaintiff / defendant] and could have been produced by [him / her], and no reasonable excuse for the [plaintiff's / defendant's] failure to produce the evidence was given, you may infer that the evidence would have been adverse to the [plaintiff / defendant].)

(b)†(The [plaintiff / defendant] in this case has not offered [the testimony of [name] / [identify exhibit]]. As no reasonable excuse for the [plaintiff's / defendant's] failure to produce this evidence was given, you may infer that the evidence would have been adverse to the [plaintiff / defendant], if you believe that the evidence was under the control of the [plaintiff / defendant] and could have been produced by [him / her].)

(c)**(The [plaintiff / defendant] in this case has not offered [the testimony of [name] / [identify exhibit]]. As this evidence was under the control of the [plaintiff / defendant] and could have been produced by [him / her], you may infer that the evidence would have been adverse to the [plaintiff / defendant], if you believe that no reasonable excuse for [plaintiff's / defendant's] failure to produce the evidence has been shown.)

(d)††(The [plaintiff / defendant] in this case has not offered [the testimony of [name] / [identify exhibit]]. You may infer that this evidence would have been adverse to the [plaintiff / defendant] if you believe that the evidence was under the control of the [plaintiff / defendant] and could have been produced by [him / her], and no reasonable excuse for [plaintiff's / defendant's] failure to produce the evidence has been shown.)

Note on Use

The words “plaintiff” and “defendant” may be replaced by “petitioner” and “respondent” in cases in which the latter terms are used to describe the parties.

If requested, the appropriate one of the above instructions should be given under the following circumstances:

*Instruction a should be given when the Court finds that—

- 1.the evidence was under the control of the (plaintiff) (defendant) and could have been produced by him or her;
- 2.no reasonable excuse for (plaintiff's) (defendant's) failure to produce the evidence has been shown; and
- 3.the evidence would have been material, not merely cumulative, and not equally available